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ABSTRACT

The Freedom of Information Act (FOIA) eliminated the "need to know" requirement for access to information, requiring agencies to give notice of file contents and make records available to all persons. Agencies are required to make available final opinions, statements of policy and interpretations, and staff manuals that affect a member of the public, as well as other records. To enable researchers to locate information, FOIA contains provisions which require agencies to publish organizational descriptions and directions for gaining access to information. Agencies are also required to compile indexes of materials which establish policies or precedents affecting the public. Formal requests for material and appeals should be made by letter to the agency. If the agency denies an appeal, the requestor has the right of judicial review. Exemptions from FOIA include (1) classified national defense and foreign policy documents; (2) internal personnel rules and practices; (3) information exempt under other laws; (4) confidential business information; (5) internal communications; (6) personnel and medical files; (7) investigatory files; (8) financial institutions information; and (9) geological information concerning wells. The text of FOIA and a bibliography are appended. (CWM)

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A RESEARCHERS GUIDE

TO THE

FREEDOM OF INFORMATION ACT

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BACKGROUND

The Freedom of Information Act (FOIA) was enacted by Congress in 1966; in 1974 a series of amendments were added to strengthen and refine the Act. Prior to FOIA there were few statutory guidelines delineating how an individual could gain access to information possessed by the government. The burden was on the individual to prove his right of access to government records; there was no remedy at law for those denied access.

The FOIA was the first federal statute devoted entirely to the matter of public access to government information; it applies to departments of the executive branch of the federal government and certain other agencies. It does not apply to Congress or the Judiciary.

FOIA eliminated the "need to know" requirement for access to information; agencies are required to give notice of what their files contain and make records available to all persons.

Certain information is exempt from disclosure, but the burden of proof has shifted to the government; and agency must bear the burden of justifying the refusal of information. A mechanism for appeal and judicial review was established to provide a remedy when agencies deny access to information. Judicial remedies include punitive sanctions for agency officials who arbitrarily and capriciously withhold information.[1] The Act as a whole creates a presumption in favor of disclosure.

EXPLANATION

The FOIA is applicable to any department of the executive branch, and to military departments, government corporations, government controlled corporations, and independent regulatory agencies. These agencies are required to make available for public inspection and copying final opinions, statements of policy and interpretations, and staff manuals that affect a member of the public.[2] In addition to the classes of materials specified above, agencies are required to make available all other records which are reasonably described.[3]

Records may be documents, recordings, computer files or other items in the possession of an agency or subject to its substantial control or use; it is not necessary to seek access from the agency having the original copy or from the agency

which produced the document. FOIA does not require an agency to collect information not already on hand; however, the agency may have to search numerous records and collate data to comply with a request thus resulting in a document which the agency did not previously possess.[4] Description of a requested record would be "sufficient" if it enabled a professional employee who was familiar with the subject area of the request to "locate the record with a reasonable amount of effort."[5]

Certain information may be exempt from disclosure under FOIA. The exemptions are as follows:

1. Classified documents concerning national defense and foreign policy;
2. Internal personnel rules and practices;
3. Information exempt under other laws;
4. Confidential business information;
5. Internal communications;
6. Personnel and medical files and similar files, the disclosure of which would constitute an invasion of privacy;
7. Investigatory files;
8. Information concerning financial institutions;
9. Geological information concerning wells.[6]

Agencies can refuse to disclose information that falls within one of these nine exemptions. "However, the legislative history of the act makes it clear that Congress did not intend for agencies to use these exempt categories to justify the automatic withholding of information. Rather, the exemptions are intended to designate those areas in which, under certain circumstances, information may be withheld."[7]

To enable researchers to locate information and determine how to secure information, FOIA contains provisions which require agencies to publish organizational descriptions and directions for gaining access to information. This data is contained in the Code of Federal Regulations and kept up to date by supplementary information published in the Federal Register. Such regulations generally set forth the details of organization of an agency, and prescribe how to submit a request for information and how to appeal in the event that a request is denied. The regulations also contain a schedule of fees to be charged for document search and duplication; fees are limited to the direct costs of search and duplication but it must be recognized that such costs may be substantial if they involve the use of computer time or involve the search of voluminous records. Waiver or reduction of the fees are permitted when the information primarily benefits the general public or when

the requester is indigent. Fee waiver policies vary widely between different agencies. Agencies may also require advance deposit of fees when they determine that search requests are likely to exceed a certain specified charge, but the legislative history of FOIA indicates that Congress intended that fees should not be used to discourage requests.[8]

Agencies are required to compile indexes of materials such as rules and interpretations which establish policies or precedents affecting the public. Materials specifically required to be indexed are as follows:

1. Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
2. Those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and
3. Administrative staff manuals and instructions to staff that affect a member of the public.[9]

Other records are not required to be indexed. Agencies are not required to maintain an index of exempt materials. However, "agencies cannot fail to disclose or index documents merely because some portions of the documents may be exempt. Rather than withholding such documents, agencies must delete the

exempt portions and then index and make available for public inspection any reasonably segregable remainder."[10]

Indexes maintained by agencies are to be published at least quarterly unless publication is determined to be unnecessary and impracticable. Publication can be undertaken by the agency; publication can be delegated to commercial firms as long as the indexes they produce are made available for public use. A list of indexes published by various agencies is printed in the Federal Register each quarter. Publication of indexes may be "unnecessary" when there is not enough interest in an agency's indexes to make publication worthwhile. Publication may be "impracticable" where the utility of the index does not bear a reasonable relationship to the effort involved in its publication. Although an agency may decide not to publish an index because it is unnecessary and impracticable, the agency must still compile the index, make it available for public inspection, and provide copies upon request at a cost not in excess of the direct cost of duplication.[11]

REQUEST PROCEDURES

To make a request for information it is first necessary to determine what is wanted and which agency is most likely to have it. General information about federal agencies may be found in the United States Government Manual. Local or field

offices of agencies may be able to provide assistance. By gaining access to indexes it may be possible to determine the location of information. If these resources do not yield the location of information another strategy is to write a letter to the agency most likely to have it.

The formal request for information under FOIA should be made in a letter to the agency addressed in the manner specified in the agency's FOIA regulations. It is advisable to write "Freedom of Information Request" on the front of the envelope and in the heading of the letter. Agencies are supposed to determine within ten working days whether to comply with a request; many agencies interpret this requirement as ten working days from the time that a letter is identified as a FOIA request.[12] Clear labeling will assist in the prompt identification of the request as a FOIA request. Experience has shown a widespread failure of agencies to comply with the ten-day requirement for responses; for example, a request directed to the Immigration & Naturalization Service in December, 1977, did not generate a response until May 6, 1978, and a request to the Commodity Futures Trading Commission was ignored entirely.

In most instances agencies will provide copies of pertinent materials when they act favorably upon a request for information;

fees for copying the materials will be assessed in conformity with the fee schedule established by regulations. Most agencies maintain public reading rooms or other facilities where members of the public may inspect materials disclosed under FOIA. It may be possible to save money by inspecting materials at these public inspection locations instead of having the agency reproduce the materials. Current indexes of various records should also be available at the public inspection locations where they may be consulted at the time that a request for information is being formulated.

In the event that an agency denies a FOIA request there are certain formalities which must be observed. The agency must specify its reasons for denying a FOIA request and provide the name and addresses of the officials responsible for denying the request. Agencies must also provide details about their appeal process when denying a FOIA request.

APPEAL PROCEDURES

Appeals should be made by letter to the designated agency official; the appeal request should include a copy of the denial letter. Requestors have thirty days from the date of denial within which to appeal the agency determination. Agencies must respond to an appeal within twenty days; in some instances

[illegible] will be processed by agency employees who have no connection with research in an appeal.

The appeal request should clarify the initial request as necessary and explain the reasons for the request. If there are court decisions which support the request it is advisable to cite them in the appeal request. The appeal request should indicate that refusal of the appeal will lead to a law suit if such action is contemplated. For these reasons it might be advisable to have the appeal request drafted and signed by an attorney. The appeal request should set for a list of records involved with specific information about what material is being withheld and for what reasons.

JUDICIAL REVIEW

If the agency denies an appeal under FOIA it must advise the requestor of the right of judicial appeal. If the agency does not respond to an appeal in twenty working days, the requestor may take the matter to court. FOIA cases are heard in the U.S. District Court. Persons may file suit in the U.S. District Court in the district where they reside or do business or in the district where the agency records are kept. It is also possible to bring suit in the U.S. District Court in the District of Columbia. It may be advantageous to bring suit in the District of Columbia because the court there has experience with FOIA matters and has generally favored disclosure. Furthermore

The 1974 amendments to the Act directed the courts to expedite consideration of FOIA cases; new FOIA cases may take precedence over other cases on the docket. Judges are permitted to make an independent determination as to whether information should be released.[17] Judges may make an in camera review of classified documents to determine whether the documents or segregable portions of the documents may be released. Courts can enjoin an agency from withholding records and thus force disclosure. If it is clear that the information should have been released to begin with, the court may direct the government to pay the complainant's attorney fees and other litigation costs. If the court issues a written finding that the circumstances indicate that agency personnel acted arbitrarily or capriciously, the Civil Service Commission is required to initiate proceedings against offending personnel. Noncompliance with orders of the court are punishable by contempt citations.[18]

EXEMPTIONS

The Act contains nine classes of exempt material. Agencies placed the broadest possible interpretations on the exemptions and used many ploys to avoid disclosing information. The courts interpreted most exemptions narrowly except those relating to national defense and investigatory files. The 1974 amendments by Congress addressed administrative issues involved in easing access; in addition the national defense and investigatory file

exemptions were narrowed to countermand broad interpretations by the courts. In 1976 congress amended the exemption for information exempted by other statutes. Following is a discussion of the nine exemptions.

Exemption 1

> This provision exempts ".....matters that are specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order."[19]

Exemption one pertains to materials that have been classified either confidential, secret, or top secret pursuant to the Executive order governing the classification of state secrets. Classified information is not automatically exempt; guidelines exist for the automatic review and declassification of state secrets. Upon receipt of a FOIA request the agency should review the requested material for possible declassification. The courts can also review classified materials but court review is not automatic; before a court orders in camera inspection the agency may establish by testimony or affidavits that the documents are clearly exempt from disclosure.[20] If the court does review classified documents it can direct that reasonably segregable portions be released.

Criteria for the application of exemption one are both substantive and procedural. Substantive criteria require that for information to be exempt there must be no substantial doubt

that release could reasonably be expected to cause damage to the national defense or foreign relations of the United States. The procedural criteria require that the process of classification must observe the formalities of the Executive order pertaining to classification; the Executive order places limits on who can classify documents, establishes the appropriate criteria for determining the classification, establishes requirements for marking documents, and places limits on distribution. Failure to adhere to these requirements may result in disclosure unless the government can secure an injunction.[21]

Exemption 2

> This provision exempts ".....matters related solely to the internal personnel rules and practices of an agency."[22]

Exemption two pertains to internal rules of an agency such as the rules relating to the use of parking facilities, regulation of lunch hours, and sick leave policy. These examples come from the Senate Committee report. Agencies have attempted to use exemption two to cover investigative manuals; this issue has not yet been resolved by the courts.

The legislative history of exemption two contained a Senate report with a narrow view of the exemption; the House report contained a broad view of the exemption. The Supreme Court's ruling in Rose v. Department of the Air Force, 425 U.S. 352 (1976), followed a narrow interpretation of the exemption. It held that

information with substantial potential for public interest outside the government should be released.[23]

The question of investigative manuals is in limbo. The courts have required disclosure of an Internal Revenue Service manual for tax auditors.[24] Other courts have exempted portions of various manuals which dealt with investigative techniques, audit strategy, litigation strategy, and surveillance methods.[25]

Exemption 3

> This provision exempts ". . .matters specifically exempted from disclosure by statute....provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld."[26]

Exemption three pertains to documents such as income tax returns, patent applications, and records regarding nuclear testing. It permits the government to withhold information where other laws clearly require it. Congress amended exemption three in 1976 following a Supreme Court decision, Administrator, FAA v. Robertson, 422 U.S. 255 (1975), which gave a broad interpretation to the exemption; the effect of the amendment was to limit the discretion of agencies in the application of exemption three.[27]

The criteria for the application of exemption three revolve around requirements of the exemption. To satisfy the criteria

the other statute must authorize or require the withholding of information from disclosure; if the statutory authority is not explicit, then the burden of proof is on the agency to show that the exemption applies. Not only must the other statute authorize nondisclosure, it must also satisfy the (A) or (B) requirements of the exemption regarding administrative discretion. Finally, the agency must demonstrate that the information sought properly fits into the appropriate categories for nondisclosure promulgated by the qualifying other statute.

Exemption 4

> This provision exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential."[28]

Exemption four covers trade secrets such as processes, formulas, manufacturing plans, and chemical compounds; it also covers commercial and financial information such as sales data, bid data, and salary data. The fourth exemption has been invoked frequently by the government and disputed vigorously in litigation.[29] Many companies have used the FOIA to gain information about their competitors from the government; two agencies frequently subject to such requests are the Food and Drug Administration and the Securities and Exchange Commission.[30] Use of the FOIA for industrial espionage has resulted in "reverse FOIA cases" wherein companies who have submitted information to the government

seek an injunction against disclosure.

Exemption four establishes three criteria for nondisclosure; all three criteria must be met for material to be withheld. The first criterion is one of definition; to be withheld the material must be either a trade secret or it must constitute commercial or financial information. The second criterion is that the material must have been obtained by the agency from a "person". For purposes of the FOIA a person may be either an individual, a partnership, or a corporation; information generated by the government either within the agency or passed between agencies does not qualify as being obtained from a person. The third criterion is that the material be confidential.

Material is deemed to be confidential when disclosure is likely to cause substantial harm to the competitive position of the person providing the information, or when disclosure is likely to impair the government's ability to obtain future information.[31] The promise of confidentiality by an agency is not enough to place the information within the exemption; the information must satisfy the above tests. The initial responsibility for confidentiality rests on the person who supplies the information to the agency; unless that person requests confidentiality the government cannot withhold the information by citing exemption four.[32]

Exemption 5

> This provision exempts ". . . inter-agency or intra-agency memorandums or letters which would not be available to a party other than an agency in litigation with the agency."[33]

Exemption five protects written advice, recommendations, and opinions of agency personnel involved in the policy-making processes of government. The reasons for the exemption are to promote spontaneous and frank interchanges of ideas, to protect the quality of agency decisions, and to prevent premature disclosure of agency deliberations. Congress was concerned that agency personnel might be inhibited in the policy-making process if they knew that all their communications were subject to public disclosure.

Several distinctions have been made in the interpretation of exemption five. A distinction has been made between policy-oriented memorandums and fact-oriented memorandums; policy-oriented memorandums are protected by the exemption whereas purely factual reports are not. However, where factual information is "inextricably intertwined with policymaking processes" it may be exempt;[34] furthermore, in certain limited circumstances facts can be withheld if disclosure would impair the agency's ability to obtain information essential to the decision-making processes.[35]

A distinction is also made between predecisional documents and postdecisional documents; predecisional documents may be exempt whereas postdecisional documents must be disclosed. One major reason for enacting the FOIA was the desire by Congress to eliminate "secret" lawmaking by administrative agencies; the disclosure of decisions and memorandums interpreting those decisions is consistent with congressional intent. Once a policy is adopted the public has a right to know; communications that relate to decisions already made must be disclosed. If any agency decision cites a predecisional memorandum, then that memorandum cannot be withheld under exemption five.[36]

Exemption 6

> This provision exempts "....personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[37]

Exemption six pertains to files containing intimate details about the private lives of individuals. Congress wanted to protect individuals from disclosure of their intimate personal information contained in personnel files and files in agencies such as the Veterans Administration, Selective Service System, and the Department of Health Education and Welfare. Exemption six is the only exemption which requires a balancing of interests between disclosure and nondisclosure.

The threshold question for exemption six deals with the

types of files that are exempt; personnel and medical files do not need elaborate definition. The problem comes in defining the "similar files" to be protected from disclosure. It would seem that the personal quality of the information is the crucial factor; information about medical condition, marital status, religious beliefs, philosophical beliefs, reputation, alcoholism, would be the type of information where disclosure would be an invasion of personal privacy.

The exemption protects personal information from disclosure which would be a clearly unwarranted invasion of personal privacy but does not define the term. An invasion of personal privacy may be anywhere along a spectrum from negligible embarrassment to gross intrusion. Lack of definition suggests the need for discretion on the part of agencies and the courts in balancing interests between disclosure and nondisclosure.

The protected interest is confidential information composed of intimate personal details identifiable to a particular individual. Nonconfidential information is not insulated from disclosure just because it is stored in "personnel files" thus reasonably segregable portions may be released.[38]

Exemption 7

> This provision exempts "....investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and prodedures, or (F) endanger the life of physical safety of law enforcement personnel."[39]

Exemption seven covers investigatory records in both civil and criminal matters regardless of whether the proceedings are judicial or administrative. Exemption seven was changed by the 1974 amendments. Prior to the amendments there were a series of conflicting interpretations by the courts; the effect of the amendments was to repudiate the broad interpretations of the exemption and establish substantive criteria for the interests to be protected by the exemption.

To be protected a record must be both investigatory and compiled for the law enforcement purposes. Materials routinely submitted to an agency such as the Securities and Exchange Commission would not be exempt because they are not investigatory records. Covert personnel investigations conducted by the Central Intelligence Agency within the United States were held

to be not exempt because the agency has no legal domestic law enforcement function.

Each record in a file may be subject to a separate determination under the amended exemption whereas the entire file was protected prior to the amendment. Even if information is contained in investigatory records complied for law enforcement purposes, it is not exempt unless disclosure would harm one of the six enumerated interests protected by the exemption.[40]

Exemption 8

> This provision exempts information "....contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[41]

Exemption eight pertains to materials such as investigatory reports of the Federal Reserve Board concerning Federal banks. The term financial institutions has been deemed to include banks, trust companies, investments banks, and banking associations. Securities exchanges and broker-dealers subject to regulation by the Securities And Exchange Commission were deemed to fall outside the definition of financial institutions.[42]

Exemption 9

> This provision exempts "....geological and geophysical information and data, including maps, concerning wells.[43]

Exemption nine was provided because it was unclear whether geological and geophysical data were covered by the provisions regarding trade secrets. It was feared that exploratory findings by private oil companies gained at great expense would become available to competitors in the absence of a specific exemption.

CONCLUSION

The Federal government is a vast storehouse of untapped information. The Freedom of Information Act gives the researcher a tool to secure information from the government. The Act has already elicited long-hidden information from the files of government. The implications of the Act are only just being grasped. The better people understand the law, the more they will use it.

The Freedom of Information Act is founded on the premise that the government and the information it possesses belong to the people. According to Ralph Nader, "More than any other law, the Freedom of Information Act gives the U.S. citizen parity with this government. Can there be any doubt that such a law is a cornerstone of democracy?"[44]

FOOTNOTES

[1]5 U.S.C. § 552 (a)(6)

[2]Ibid. § 552 (a)(2)

[3]Ibid. § 552 (a)(3)

[4]Christine M. Marwick, ed., Litigation Under the Amended Federal Freedom of Information Act (Washington: The Project on Civil Liberties, 1977), p. 5.

[5]U. S. Department of Justice, Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act (Washington: U. S. Government Printing Office, 1975), p. 32.

[6]5 U.S.C. § 552 (b)

[7]U. S. Congress, House, Committee on Government Operations, A Citizen's Guide on How to Use the Freedom of Information Act in Requesting Government Documents (Washington: U. S. Government Printing Office, 1977), p. 25.

[8]Ibid. p. 6.

[9]5 U.S.C. § 552 (a)(2)

[10]Attorney General Memo., op. cit., p. 38.

[11]Ibid. pp. 16-17.

[12]5 U.S.C. § 552 (a)(6)

[13]Ellen Clark, "Holding Government Accountable - The Amended Freedom of Information Act," Yale Law Journal 84 (1975): 737.

[14]Ibid., p. 749.

[15]Marwick, op. cit., appendix p. 88.

[16]Citizens Guide, op. cit., p. 25.

[17]Ibid., p. 6.

[18]5 U.S.C. § 552 (a)(6)

[19]5 U.S.C. § 552 (b)(1)

Attorney General Memo., op. cit., p. 3.

Marwick, op. cit., pp. 11-13.

5 U.S.C. § 552 (b)(1)

Citizen's Guide, op. cit., pp. 10-11

Michael E. Hennigan and Francis J. Koster, "Freedom of Information Act — Parameters of the Exemptions," Georgetown Law Journal 62 (October 1973): 186.

Marwick, op. cit., p. 15.

5 U.S.C. § 552 (b)(3)

Marwick, op. cit., pp. 18-19.

5 U.S.C. § 552 (b)(4)

Hennigan, op. cit., p. 186.

Lee Smith, "Washington's New Klondike," Dun's Review 100 (October 1972): 70

Marwick, op. cit., pp. 20-25.

Hennigan, op. cit., p. 188.

5 U.S.C. § 552 (b)(5)

Hennigan, op. cit., p. 191.

Marwick, op. cit., p. 33.

Hennigan, op. cit., p. 196.

5 U.S.C. § 552 (b)(6)

Marwick, op. cit., p. 38.

5 U.S.C. § 552 (b)(7)

[40]Marwick, op. cit., p. 58.

[41]5 U.S.C. § 552 (b)(8)

[42]Hannigan, op. cit., pp. 205-6.

[43]5 U.S.C. § 552 (b)(9)

[44]"Opening Federal Files," Newsweek, 19 June 1978, p. 86.

APPENDIXES

APPENDIX 1.—TEXT OF THE FREEDOM OF INFORMATION ACT

FREEDOM OF INFORMATION ACT

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency

shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(4)(A) In order to carry out the provisions of this section, each agency shall promulgate regulations, pursuant to notice and receipt of public comment, specifying a uniform schedule of fees applicable to all constituent units of such agency. Such fees shall be limited to reasonable standard charges for document search and duplication and provide for recovery of only the direct costs of such search and duplication. Documents shall be furnished without charge or at a reduced charge where the agency determines that waiver or reduction of the fee is in the public interest because furnishing the information can be considered as primarily benefiting the general public.

(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

(C) Notwithstanding any other provisions of law, the defendant shall serve an answer or otherwise plead to any complaint made under this subsection within thirty days after service upon the defendant of the pleading in which such complaint is made, unless the court otherwise directs for good cause shown.

(D) Except as to cases the court considers of greater importance, proceedings before the district court, as authorized by this subsection, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

(F) Whenever the court orders the production of any agency records improperly withheld from the complainant and assesses against the United States reasonable attorney fees and other litigation costs, and the court additionally issues a written finding that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding, the Civil Service Commission shall promptly initiate a proceeding to determine whether disciplinary action is warranted against the officer or employee who was primarily responsible for the withholding. The Commission, after investigation and consideration of the evidence submitted, shall submit its findings and recommendations to the administrative authority of the agency concerned and shall send copies of the findings and recommendations to the officer or employee or his representative. The administrative authority shall take the corrective action that the Commission recommends.

(G) In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

(5) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall—

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

(B) In unusual circumstances as specified in this subparagraph, the time limits prescribed in either clause (i) or clause (ii) of subparagraph (A) may be extended by written notice to the person making such request setting forth the reasons for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension for more than ten working days. As used in this subparagraph, "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request—

(i) the need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(iii) the need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of the agency having substantial subject-matter interest therein.

(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the application time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the records. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

(b) This section does not apply to matters that are—

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency

responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

(d) On or before March 1 of each calendar year, each agency shall submit a report covering the preceding calendar year to the Speaker of the House of Representatives and President of the Senate for referral to the appropriate committees of the Congress. The report shall include—

(1) the number of determinations made by such agency not to comply with requests for records made to such agency under subsection (a) and the reasons for each such determination;

(2) the number of appeals made by persons under subsection (a)(6), the result of such appeals, and the reason for the action upon each appeal that results in a denial of information;

(3) the names and titles or positions of each person responsible for the denial of records requested under this section, and the number of instances of participation for each;

(4) the results of each proceeding conducted pursuant to subsection (a)(4)(F), including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) a copy of every rule made by such agency regarding this section;

(6) a copy of the fee schedule and the total amount of fees collected by the agency for making records available under this section; and

(7) such other information as indicates efforts to administer fully this section.

The Attorney General shall submit an annual report on or before March 1 of each calendar year which shall include for the prior calendar year a listing of the number of cases arising under this section, the exemption involved in each case, the disposition of such case, and the cost, fees, and penalties assessed under subsection (a)(4)(E), (F), and (G). Such report shall also include a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.

(e) For purposes of this section, the term 'agency' as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

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